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ABSTRACT

There is evidence that the technical sphere of argument has been elevated generally at the expense of the public sphere, and specifically to the detriment of the public's ability to understand and participate in the formation and administration of public policy. Oversight of regulatory agencies by all three branches of the government holds the potential for public criticism of technically-based decisions. In practice, however, structural and procedural obstacles appear to exclude meaningful public participation. Successful public involvement in administrative agency decision making can involve "playing by the rules" of institutionalized access or "changing the rules." Either way, organization into a group with a strong public voice and with access to expertise is necessary. Public groups must possess sufficient foresight into the implications of proposed administrative changes and must be in a position to appeal to governmental oversight forums. The adversarial nature of the judicial system makes it the best apparent forum for public challenges to administrative rulemaking. It is the role of communication scholars to continue exploration of the structural and discursive barriers to public education and participation in the public policy process. Scholars must also explore means of placing the public voice on a level of parity with the technical sphere. (Twenty-seven references are attached.) (SG)

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PUBLIC PARTICIPATION IN REGULATORY DECISIONS: OPTIONS AND STRATEGIES

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PUBLIC PARTICIPATION IN REGULATORY DECISIONS: OPTIONS AND STRATEGIES

A growing body of literature by rhetorical and argumentation theorists has called the attention of the communication profession to the impact of the increasing hegemony of technical expertise in the communicative activity of public-sphere decision making. For the most part, the concern has centered on the evidence that the technical sphere of argument has been elevated generally at the expense of the public sphere, and specifically to the detriment of the public's ability to understand, let alone participate in, the rhetoric of the formation and administration of public policies that affect their lives. In a society committed to a democratic ideology, that is a disquieting specter, since it denies the viability of the social ideology and ultimately removes us from the discourse of control over their lives. It is the intent of this paper to begin an exploration of the pragmatic options available to the public arguer who wishes to become more involved in the public discourse.

G. Thomas Goodnight has been at the forefront in exploring the grammar of the hegemony of the technical over the public sphere. An early essay characterized the technical sphere as one in which there are "more limited rules of evidence, presentation, and judgment" in order to "identify arguers of the field and facilitate pursuit of their interests." On the other hand, the public sphere was characterized by the provision of "forums with customs, traditions, and requirements for arguers in the recognition that the consequences of dispute extend beyond the personal and technical spheres" ("Personal, Technical and Public" 220). As fields of knowledge become increasingly fragmented, and as public policy becomes increasingly dependent upon technical expertise, there is a concomitant decline in the role of the public voice. Thus encroaching on the realm of public deliberative argument, technical expertise may come to replace, rather than inform, public policy decision making.

More recently, Goodnight has shifted emphasis to a macrocosmic perspective on the role of argument and has advanced a paradigm of time and space as the constitutive elements of the public, technical, and personal spheres ("Public Discourse"). In addition, he has argued that there is a "generational" pace, as well as arena, of change in the technical and public spheres of argument ("Generational Argument"). By reference to that paradigm, Goodnight has been able to point to works like Rachel Carson's Silent Spring to exemplify the expansion of the public realm of argument.

Without denying the legitimacy of Goodnight's macrocosmic paradigm, I would argue that it is less useful for exploring the pragmatics of the options available to a public desirous of participation in the public discourse in the "here and now." A dominant axiom of our discipline is that persuasive communication is addressed to specific audiences and takes place in specific situations and in specific forums, all of which have an impact on the acceptability and efficacy of particular argumentative practices.

In this light, Hauser offers a more useful perspective. He draws upon Habermas to define the public sphere as the discursive space "in which individuals and groups may transcend their private concerns to interact freely in ways conducive to forming a common sense of reality" (438). This discursive space is frequently institutionalized in specific forums that allow a rhetorical mediation between society and the state. In those forums, functional legitimacy of the public sphere is conditioned upon access to the forum by all citizens, access by citizens to information, access to "specific means of transmitting information," and some form of "institutional guarantees" (438-439).

I have argued elsewhere that, at least in the United States, "the ubiquitous regulatory agency is a particularly appropriate forum as the context for studying the relative hegemony of the technical and public spheres of argument. It functions at the nexus of the two realms of argument practice" ("Regulatory Rhetoric" 72). Several features of independent regulatory agencies (IRC) are worthy of note.

From their beginnings in the late 19th Century, the institutional rationale and pattern has remained relatively stable. In varying degrees, the IRC arose out

of the need for public oversight of complex economic organizations and/or new technologies about which individual legislators or judges were likely to have little knowledge. The regulatory agencies are supposedly able to "concentrate wholly on the day-to-day workings of particular industries and be staffed with experts familiar with the economics of these businesses" (Baughman 3-4. Also see Meier 9-36 and Reagan 45-52). The agencies typically operate under broad policy mandates from the parent legislative body which not only limit the jurisdiction of issues within their purview, but also specify the grounding of acceptable arguments when making decisions about the regulated industry. The result is mandated agency attention to both the technical and public spheres of argument in their decision making.

The initial enabling legislation typically provides ambiguous, highly value laden criteria for decisions, coupled with agency discretion to institute operational rules, regulations and procedures. For example, for over 60 years the Federal Radio Commission and its successor, the Federal Communications Commission, has operated under the mandate to regulate access to the airwaves using the positive criteria of "public interest, convenience and necessity" and, simultaneously, a prohibition against censorship (Baughman 6-8). Lacking specific legislative definitions of key terms like "public interest," the agencies usually have some discretion to determine policies and administrative procedures for carrying out the general mandate. This procedural discretion can profoundly affect acceptability of participants, evidence, and reasoning patterns used in regulatory decision making.

Hypothetically, the regulatory agencies are independent of the executive, legislative and judicial branches of government, thus requiring incorporation of the functions and reasoning practices of all three. In practice the agencies undergo persistent scrutiny by all three branches. The executive branch typically retains the power of appointment of a portion of the commissioners. The legislature not only holds the purse strings, but also may use hearings as a vehicle for scrutinizing and sometimes revising an agency's policies and procedures. Since agency decisions may be appealed in the courts, the judiciary may have a profound affect upon agency activities. From a rhetorical perspective, this fact of expansive oversight holds potential for public criticism of decisions grounded in technical reasoning, and for revision of the institutionalized criteria to a point

where they are more conducive to public sphere arguments.

Case studies of the rhetoric of the regulatory forum lend credence to Goodnight's speculation that argument practices in the mode of the technical sphere "substitute the semblance of deliberative discourse for actual deliberation" ("Personal, Technical and Public" 215). At the local level, Stearney's analysis of a zoning dispute identified structural and procedural provisions of the forum that effectively exclude meaningful public participation while privileging technical expertise (22-24). At the state level, my analysis of utility rate hearings by the Maryland Public Service Commission pointed out the impact of institutionally mandated groundings of argument: they reduce public participation to the level of cathartic expression and lead to a rhetoric of decision legitimation in which the public is seen as passive audience rather than as an active participant in the decision process ("Argumentation in Utility Rate Hearings"). At the national level, my study of the Federal Communication Commission confirmed the structural, procedural and technical-sphere discursive barriers to public participation. This study further noted that, even when attempted revisions are initiated from within the agency, the legislative mandate and the discursive and procedural traditions render institutionalized forums highly resistant to modifications of discursive procedures that accommodate public access and alternative argument grounds ("Regulatory Rhetoric").

While there is major potential for the technical sphere to abuse the legitimate role of the public sphere, the reverse is also true. The public sphere may intrude into the legitimate domain of the technical sphere and operate to the detriment of rational decision making. For example, Rowland's analysis of the Challenger disaster led him to argue convincingly that "members of the public may either usurp the role of experts in deciding questions of fact or use pressure tactics to bias expert decision- making" (139). So too, Bantz' comparative study of the FDA proposal to ban saccharin and the Consumer Product Safety Commission's ban on Tris demonstrated that a lack of "shared understanding" between public and experts may lead to public-sphere adoption of rhetorical strategies that are inimical to intelligent discussion of significant public issues (139).

If there is mutual potential for technical and public sphere abuses of the

decision-making process, then the goal should be restoration of balance to the policy-making/administration system. In the spirit of the Sixth Alta Argumentation Conference's concern for fusion (For example, see Biesecker and Dauber.), the objective should be a restoration that facilitates the public voice and reduces the hegemony of technical expertise without denying the legitimate informative role of the technical sphere. Since it does society no good to achieve a balanced fusion by decreasing the informative function of technical expertise, the objective must be empowerment of the public sphere to a level of parity with the technical.

Rowland was at least partially correct in advocating a dialectical process for balancing the competing spheres. He noted that arguments in the public sphere address questions of value and policy to an audience composed of the "general public or its representatives." Technical arguments, on the other hand, address questions of fact to an audience of technicians and scientists. In the conjunction of the two spheres, "experts are limited by public support, while public policy is limited by technical feasibility." In order to achieve policy decisions that are informed, but not dominated, by technical expertise, Rowland argued for an adversarial system of competing experts vying for a decision from an audience of judges that includes representatives of both spheres (139-143).

As applied to regulatory agencies, there are several inadequacies in this model. First, it only addresses the issue of comparative factual expertise, thus still leaving silent the voice of competing value-grounded arguments. Increasing the capacity of decision makers to weigh competing factual claims does not reduce the hegemony of the technical sphere; it only tilts the scale further to the technical side. Second, if one of the major barriers to public participation is limited access to the regulatory forum, adding an additional competing technical voice and improving technical expertise of the decision makers does nothing to break down that access barrier. Third, even when the system incorporates public access, public expertise, and members of the regulatory agency who truly function as representatives of the general public, the regulators are free to give credence to the public voice only if the arguments coincide with the legislatively-mandated, judicially-approved interpretations of reasonable criteria for decisions.

As the foregoing analysis implies, there seem to be three potential barriers to public-sphere influence in regulatory forums:

1. Inadequate public access to the forum during the advocacy stages of deliberations on particular decisions.
2. Inability of the public to meet the institutionalized standards of acceptable evidence.
3. Public-sphere value claims that are incompatible with those embedded in the institutional interpretations of the legislative mandate.

The intent of the second part of this paper is to begin an exploration of options for improving the balance of public-sphere influence in the regulatory forum. It behooves communication professionals to begin identifying methods of public empowerment in institutional forums where the technical and public spheres of argument are fused to decide public issues.

Successful public involvement in administrative agency decision making can pursue two paths. The first option is to "play by the rules." The second is to "change the rules." While the former requires the public advocates to incorporate the institutionalized avenues of access, standards of technical data and decision criteria, the latter requires the advocates to address the oversight forums in order to gain acceptance of alternative access routes and argumentative grounds.

Regardless of the strategic option, organization into a group with a concerted and consistent public voice is a necessary precondition for successful travel along either route. In a governance system devoted to representation, elected and appointed officials alike must be able to point to a constituency to justify policy decisions. For instance, in the early 1960's, Newton Minnow failed to achieve qualitative programming criteria for FCC decisions, at least partially because there was no organized public voice to support his claims (Wallinger, "Regulatory Rhetoric"). At a minimum the group must be perceived as large enough, powerful enough, and "reasonable" enough to get the attention of, and gain access to, the particular representatives to whom they appeal. For public officials to appear to speak only for an individual is to invite charges of violation of the public trust. Whether justified or not, that charge is inimical to the goals of public participation in the decision process.

In addition to the rhetorical necessity of an apparent constituency, other non-rhetorical advantages accrue from organization. The group can provide the financial resources sometimes needed to supply the data on which reasonable arguments are based. The group also provides a ready source of advocates and supporters needed to testify in the name of the group at public meetings.

When public advocates enter the regulatory arena to address a specific decision, empowerment usually depends on adherence to the institutionalized procedures and argument practices. As applied to forum access, this usually means attending meetings where public testimony is gathered prior to decisions made in closed meetings. In order to have an impact on the policy, it is vital that the public voice be heard before final, or even tentative, decisions are made. If the public voice is to gain parity with the technical, it is far easier to help fashion the decision than it is to assume the burden of proof that a decision was unwise. In many states and localities the public advocates can enforce access through existing "sunshine laws" that require the public business to be done in public.

As applied to data requirements, "playing by the rules" requires advocates who are proficient in the relevant technical expertise. For example, decisions on a landfill siting may require advocates with credible proficiency in the data and reasoning patterns of geography, geology, economics, and civil engineering, as well as the ability to marshal that data to meet the evidentiary requirements of the forum. The point is that no matter how massive the data, if it does not conform to the institutionalized standards of credibility and relevance, the impact on the decision is likely to be negligible.

If the group membership does not include such expertise, or if members are unable to acquire the technical proficiency within the time constraints of the decision process, the expensive alternative is to hire somebody with that expertise. Some agencies provide another alternative in the form of an ombudsman. For example, the Maryland Public Service Commission incorporates the staff of the Office of People's Counsel to gather input from the public and to represent the public voice in utility rate hearings. In these situations, meaningful expression of the public voice depends on the ability of the public to supply the ombudsman with data that meets the institutionalized standards.

The third requirement for meaningful impact on decisions when "playing by the rules" is to ground the arguments in institutionally relevant criteria. While local boards of education are not regulatory agencies in the classic mold, a comparison of two communities' efforts to retain local high schools in school consolidation decisions illustrates the point. Advocates from one town grounded their arguments in the values of community, wherein a local school functions as a central socializing force in the maintenance of the community itself. For example, they argued the negative impact of consolidation on the economic stability of the town, reduced community involvement in school-based social activities, the loss of a tradition of sports rivalries, and problems and expense of student transportation to class and extra curricular activities. Advocates from the other town mounted a persuasive campaign grounded in the values of high quality education. They argued that bigger is not necessarily better and supported the claim by pointing to a record of successful graduates, closer teacher-student relationships, and more personal involvement of parents in the educational process. The former community no longer has a high school located in their community, while the latter still has one of the smaller high schools in Maryland. Even though a school board may be sympathetic to the negative impact of decisions upon the larger community, the institutionally mandated decision criteria mitigate against using arguments that do not address those values.

The second path for public involvement in regulatory decision making leads toward long-term modifications that render the public voice more powerful in future decisions, rather than toward impact on particular case decisions grounded in preexisting institutional requirements. Since the initial enabling legislation typically provides some agency discretion to institute operational rules, regulations and procedures, the first avenue of empowerment is to address the regulatory forum itself. Since there is administrative, judicial and legislative oversight of regulatory agencies, the second avenue of empowerment is to move the dispute to one or more of these forums.

The last half of this century has witnessed a dramatic shift in agency policy making from the quasi-judicial, case-by-case approach to the quasi-legislative, rule-making approach. In the former, agency policy emerges from the precedents of agency adjudication in individual cases. In rule-making, as practiced at the

federal level in recent years, the agency is typically required to announce proposed rules proposals and to hold adversarial hearings "which allow interested parties to introduce evidence of their own and to challenge agency assertions through cross-examination and rebuttal" (West, 328). Thus, at the federal level, and at the state and local level to the extent that those agencies adhere to the federal model, rule-making proceedings offer significant potential for empowerment of the public sphere of argument.

Specifically, there exists an opportunity for public interest groups to voice the merits of alternative values and different applications of criteria and to argue for evidentiary rules that allow for other than technically privileged data. Taking advantage of that potential requires vigilance to discover the announcement of such rule-making proceedings, the human resources to attend and to testify at the hearings, and the financial resources to gather the data needed to sustain the arguments under the fire of cross examination. These requirements can probably only be met through an organization of citizens committed to long-term changes in policy. From a rhetorical perspective, the public advocate must make sure the alternative groundings of argument are compatible with the values embedded in the original legislative mandate.

If there is potential in guaranteed access to the rule-making forum, there are also major rhetorical barriers to effective participation in those hearings. The most significant obstacle is likely to be inadequate foresight into the implications of the proposed changes. A regulated industry has years of individual and corporate experience in dealing with agency policies and rules as a frame of reference for perceiving the impact of the proposed changes. The public advocate, on the other hand, is likely to be concerned with only a limited spectrum of the total rule-making proposal, and is perceptually constrained from insight into the implications of the proposal by the lack of experience in day-to-day operation under agency guidelines.

The other avenue of changing the rules in order to empower the public voice is to appeal to the oversight forums. The administrative forum would seem most appropriate when the barrier arises in the person of particular appointed regulators. In a society committed to a philosophy of public trust in elected officials, and a government structure that delegates the implementation of that

trust in regulatory policies, one approach is to pressure the elected official to remove the appointed regulator. But expansion of the public voice in public affairs is likely to occur only if the appointee was interpreting or ignoring agency policy in such a way as to further constrain public involvement. Changing regulators does not change the legislatively-mandated criteria. Nor does it change an elected official's philosophy of the proper degree of freedom for a regulated industry. While there may be some advantage in getting a commissioner who is more receptive to the public voice, that regulator is severely constrained by the institutionalized features of argument practices and groundings. Thus the ultimate goal should be not to determine who sits on the agency, but to build a public case for alternative values on which to base future decisions.

The legislative arena hypothetically is the most appropriate forum for increasing the power of the public voice in policy debates. As the body which determined the original need and purpose for the regulation and established the agency's decision criteria, it clearly has the authority and responsibility to modify the mandate when necessary to accommodate the public involvement. At the state and national levels the system of committee hearings offers opportunity for testimony that is not hampered by institutionalized privileging of technical data and reasoning. Indeed, Davis' recent research in committee-hearing discourse shows the predominant function of legislative hearings to be record building, and that, rhetorically, they serve as "an inventional phase in a larger discourse system" (106). Legislative hearings present an opportunity for public involvement by providing legislators with the material to be used in later debates on specific policy proposals.

However, Davis' research also points to a potential shortcoming of this option. Legislators tend to seek "useful substantiation of preexisting hypotheses, contentions, and positions" (106), rather than fact finding that informs them. In this light, the legislative arena is a viable forum for revision of decision criteria only if there is a legislator with a preexisting sympathetic ear who will incorporate the public voice in later policy debates. Otherwise, the function of public testimony remains primarily cathartic, rather than facilitating meaningful participation in the discourse of policy determination.

The judicial system seems to me to be a more viable route for expanding the

public sphere. As a forum it is committed to using an adversarial method for weighing the merits of competing interpretations of data and warrants. The judiciary not only has the power to enforce "more reasonable" interpretations of argument grounds embedded in an agency's statutory authorization, but is also less susceptible to wide variations of acceptance of lines of argument. As Melnick has noted, since the early 1970s, courts have "sought to democratize and judicialize the administrative process" and assure participation by all interested parties in regulatory policy making (653). More importantly, recent court interpretations of the Administrative Procedure Act of 1946 have required agencies to account for the publicly expressed criticism in their decision records (Melnick, 654; West, 328). Thus it is more difficult for the regulators to dismiss the publicly expressed data and values as irrelevant.

Thus we can see that not only have the courts been sympathetic to appeals for public access and to revised interpretations of the legislative mandate, but when higher courts issue rulings the decision enjoys a level of stability not to be found in either agency rule making or in the particular regulatory philosophies of transitory elected administrations. Not only do the courts function to enforce sunshine-law access for particular case proceedings, but they also hold the power to institute new interpretations of the legislative mandate and to require regulators to account for the public voice when rendering decisions.

Regardless of whether the strategic option is to "play by the rules" or the attempt to "change the rules," the public faces major obstacles in achieving discursive parity with the voice of the technical expert in policy formation and administration. I believe it is the role of communication scholars to continue exploration of the structural and discursive barriers to public comprehension and participation in the public policy process. It is also our role to explore pragmatic means of empowering the public voice to a level of parity with the technical sphere. This program has been an initial step in that direction. We need more.

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